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OCTOBER TERM 1966

No. 1059

SOUTHERN PACIFIC LAND COMPANY,
Petitioner

vs.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply to Memorandum in Opposition to Writ of Certiorari

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In its memorandum, the United States again confirms the position taken by petitioner that the decisions of the Federal Courts passing upon the jurisdiction or power of a court to review the determination of an administrative agency to take a specific estate in private property, where factually there has been no determination even by that agency that the taking is necessary to accomplish the authorized public purpose and where it is claimed that such taking is arbitrary or capricious, are in hopeless conflict and confusion. At pages 4 and 5 of its memorandum, the United States cites decisions holding both ways. It characterizes the de-

cisions holding contrary to its position as dicta but a reading of those cases will demonstrate that the statements referred to were not always dicta.

These decisions were all carefully briefed and analyzed in the briefs presented to the Circuit Court. We ask that the writ prayed for be granted and that we have an opportunity to brief and analyze those cases for this Court.

The United States refers particularly to the decision of this Court in *Berman v. Parker*, 348 U.S. 26. That was an action by the owners of real property to enjoin a condemnation pursuant to the District of Columbia Redevelopment Act of 1945. The Act authorized the Redevelopment Agency to acquire real property by eminent domain for the redevelopment of slum areas in the District of Columbia. The Agency attempted to take appellant's land upon which a department store was located. Appellant objected that this property could not be taken constitutionally because it was commercial and not residential property and did not constitute slum housing and because the Redevelopment Agency intended to place the property under private management for private and not public use. The Supreme Court held that the Act was a proper exercise of the police power and was constitutional and that it was immaterial that the purposes of the Act were to be carried out by private enterprise. The Court further held that it was within the authority of Congress to attack the problem on an area basis rather than by a structure basis. The Court stated:

> "The District Court indicated grave doubts concerning the Agency's right to take full title to the land as distinguished from the objectionable buildings located on it. 117 F. Supp. 705, 715-719. We do not share those doubts. If the Agency *considers it necessary in carrying out the redevelopment project* to take full title to the real property involved, it may do so."

This case determines just two things: (1) that the Act of Congress under which the taking was authorized was constitutional as an exercise of the police power and (2) that *when* the agency created under the Act *exercised its discretion to determine that the use of the entire property was necessary* to the successful consummation of the authorized project, it was not for the Court to question the soundness of that exercise of discretion. The Court did not hold that it lacked jurisdiction to protect the property owner against the taking of his property where there had been no proper exercise of such discretion and no determination that the property was necessary for the consummation of the project or would in fact be used for any purpose connected with the project.

The *Berman* case differs from the case at bar in that it did not involve a plea or claim that the action of the Redevelopment Agency was arbitrary, capricious or an abuse of its discretion. It was expressly pointed out in the lower court (*Schneider v. District of Columbia,* 117 Fed. Supp. 705 at 725) that the issue of arbitrary or capricious action was not pleaded and therefore was not at issue. The Supreme Court in its decision did not refer to any claim of arbitrary or capricious conduct and did not pass or comment on whether any such defense would be a proper matter for court review.

In the present case, the Assistant Secretary of the Navy did not in the exercise of his discretion determine that the taking of mineral or oil or gas rights was required for the purposes of the air base for which a taking was authorized. He testified under oath that he knew just the opposite was true. It was pleaded that under these circumstances the taking was arbitrary, capricious and an abuse of discretion.

If petitioner is given the opportunity to completely brief this question for this Court, it will demonstrate that no case has been cited by the United States which upholds a taking of private property where the decision to take was made without first making a determination that its taking was necessary or advantageous to a use authorized by statute or where the officer making the decision to take testified concerning his determination of the necessity for the taking that the property could not be used and was not intended to be used for the purpose authorized. To our knowledge, the case at bar is a case of first impression where such testimony is present.

In its memorandum, the United States now suggests that there is no occasion for this Court to declare which line of decisions found in the federal cases accurately reflects the law or to pronounce whether or not there is indeed an absolute bar to judicial inquiry into the taking. Suffice it to say that the United States has not heretofore taken this position. At the trial the United States refused to present witnesses or even to cross-examine witnesses upon the ground that there was an absolute bar to judicial inquiry and that it was entitled to a decision to this effect. The position of the United States was so definite that the judge of the District Court based his judgment solely upon that ground.

In its memorandum, the United States continues to state that the trial court held there was no evidence to support the contention that the Assistant Secretary of the Navy acted in bad faith or arbitrarily or capriciously. In this, it continues to ignore the findings and conclusions signed and filed by the District Judge which based the decision entirely upon lack of jurisdiction. This was done advisedly and we believe the findings and conclusions were so drawn

in order that this specific question could be submitted to this Court for a final decision.

Petitioner's prayer for a writ of certiorari should be granted.

Respectfully submitted,

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